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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 129

MORRIS INVESTMENT CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 29-33) is unreported. The opinion of the Circuit Court of Appeals (R. 35-38) is reported in 134 F. 2d 774.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 31, 1943 (R. 38-39). The petition for a writ of certiorari was filed on June 30, 1943. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether Section 501 of the Revenue Act of 1942 is applicable in computing the surtax on personal holding companies imposed by Section 351 of the Revenue Act of 1936, as amended by Section 1 of the Revenue Act of 1937.

2. Whether the personal holding company surtax, imposed by Section 351 of the Revenue Act of 1936, and as amended by Section 1 of the Revenue Act of 1937, is constitutional.

#### STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 7-11.

#### STATEMENT

The material facts as found by the Board of Tax Appeals may be summarized as follows:

The petitioner is a personal holding company, organized in 1928 under the laws of Delaware to engage in the investment business (R. 30). In its income tax return for 1937 it reported a net income of \$81,414.84. Its return showed a net capital loss of \$114,022.38 over the \$2,000 allowable as a capital loss deduction (R. 31). The Commissioner made no adjustments with respect to the petitioner's reported net income, but did disallow credits against the surtax on undistributed

profits and the personal holding company surtax which had been claimed by the petitioner (R. 12-15, 32).

Before the Board of Tax Appeals the petitioner contended that the provisions of its charter and bylaws constituted contracts restricting the payment of dividends within the meaning of Section 26 (c) (1) of the Revenue Act of 1936, and also that Section 14 of the Revenue Act of 1936, imposing a surtax on petitioner's undistributed profits, and Title IA of the 1936 Act, as amended by Section 1 of the Revenue Act of 1937, imposing a surtax on personal holding companies, were unconstitutional (R. 32). The Board of Tax Appeals sustained the Commissioner's determination (R. 33-34). The Circuit Court of Appeals affirmed the decision of the Board insofar as it determined petitioner's liability for the personal holding company surtax, and remanded the cause to The Tax Court with directions to reconsider petitioner's liability for the undistributed profits surtax, in the light of Section 501 of the Revenue Act of 1942 and of such evidence as might be relevant thereunder (R. 35-39).

#### ARGUMENT

1. Petitioner's contention that the amendments provided for in Sections 501 (a) (2) and (3) of the Revenue Act of 1942 (Appendix, *infra*, pp. 9-11) are applicable in computing the surtax on per-

sonal holding companies imposed by Section 351 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, as amended, is without merit. The provisions of Section 501 of the Revenue Act of 1942, captioned "Additional Credits for Undistributed Profits Tax," are expressly limited to amending Sections 14 (a) (2) and 26 (c) of the Revenue Act of 1936. The latter two sections deal only with the imposition, under Title I of that Act, of the surtax on the undistributed profits of a corporation, and the credits allowed in computation thereof. Since the surtax on personal holding companies, imposed under Title IA by Section 351 of the Revenue Act of 1936, as amended, is a separate and distinct tax expressly designated as being in addition to the normal tax and surtax on undistributed profits imposed under Title I by Sections 13 and 14 of the Revenue Act of 1936, Section 501 of the Revenue Act of 1942 can have no application in computing the surtax on personal holding companies.

2. The same objections raised by the petitioner here as to the constitutionality of the personal holding company surtax have been considered and rejected by this Court in upholding the validity of the undistributed profits tax on corporations. *Helvering v. Northwest Steel Mills*, 311 U. S. 46; *Crane-Johnson Co. v. Helvering*, 311 U. S. 54. Both in the case of the undistributed profits surtax and the surtax on personal holding companies

Congress was focusing its attention upon the avoidance of surtax by the corporate stockholders that would otherwise result in the absence of such provisions. The reasons thus assigned by this Court in sustaining the validity of the undistributed profits tax have equal application to the personal holding company surtax.

Petitioner's contention (Br. 26) that the personal holding company surtax is a tax on its capital and that the situation here presented is fundamentally different from that presented in the *Northwest Steel Mills* and *Crane-Johnson* cases on the ground that petitioner herein sustained a loss during the taxable year is without merit. As in the case of the undistributed profits tax, the surtax on personal holding companies is imposed on profits earned during the taxable year, and there can be no dispute over the fact that during the taxable year petitioner suffered no statutory loss but rather, as disclosed by its own returns (R. 31), had a statutory net income of \$81,414.84 and an undistributed adjusted net income of \$75,207.94 (R. 13). Cf. *Helvering v. Northwest Steel Mills*, *supra*, p. 53.<sup>1</sup> It may

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<sup>1</sup> Petitioner's assertion that it suffered a "loss" during the taxable year disregards the statutory limitation upon the deduction of capital losses in computing net income. While petitioner may have sustained a loss in the accounting sense, it was not one recognized by the Revenue Act. The power of Congress to limit the deduction of capital losses can hardly be questioned. *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *White v. United States*, 305 U. S. 281, 292.



also be noted that contentions essentially identical to those made herein were advanced against the validity of the personal holding company surtax and rejected in *Foley Securities Corp. v. Commissioner*, 106 F. 2d 731 (C. C. A. 8th). See, also, *Simpson & Co. v. Helvering*, 128 F. 2d 742 (C. C. A. 2d), certiorari denied, 317 U. S. 677, certiorari granted June 7, 1943, on another issue No. 1, this Term; *Girard Inv. Co. v. Commissioner*, 122 F. 2d 843 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Noteman v. Welch*, 108 F. 2d 206 (C. C. A. 1st).

#### CONCLUSION

The decision of the court below is correct. It presents no conflict or question of general importance which would warrant further review by this Court. We respectfully submit that the petition should be denied.

Respectfully submitted.

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JULY, 1943

